NO. 82-1288

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

AMERICAN BROADCASTING COMPANIES, INC.
Petitioner,

v.

RUBY CLARK,
Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT)

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. ARE THE CIRCUIT COURT'S PROCEDURES FOR ACTING ON A SUGGESTION FOR REHEARING IN BANC A MATTER SOLELY OF CIRCUIT COURT DISCRETION AND INTERNAL COURT ADMINISTRATION, WHEN THOSE PROCEDURES COMPLY WITH THE STATUTES AND COURT RULES?

II. MAY MICHIGAN'S LAW OF QUALIFIED PRIVILEGE BE INTERPRETED AGAINST VARYING FACT SITUATIONS TO GIVE RISE TO VARYING RESULTS IN DECISIONS OF THE SIXTH CIRCUIT COURT OF APPEALS?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT COURT'S PROCEDURES FOR ACTING ON A SUGGESTION FOR REHEARING IN BANC SHOULD NOT BE REVIEWED BY THIS COURT SINCE THOSE PROCEDURES ARE SOLELY MATTERS OF THE SIXTH CIRCUIT COURT'S DISCRETION AND INTERNAL ADMINISTRATION, AND THE PROCEDURES DO NOT VIOLATE THE STATUTES OR COURT RULES.

This Court should not review the internal procedures of the Sixth Circuit in acting on Petitioner's suggestion for rehearing in banc, when those procedures comply with the statute and court rule. The statute (28 USC 46[c]) and the court rule (Federal Rule of Appellate Procedure 35) empower the circuit courts to convene a panel in banc. The grant of power is not addressed to litigants. *Western Pacific Railroad Case*, 345 U.S. 247 (1953) The manner in which the power is to be administered is left to the court itself; each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised. *Western Pacific Railroad Case*, 345 US at 259.

The Sixth Circuit procedure is declared in its Rule 14. Those procedures comply with this Court's mandate in *Western Pacific Railroad Case*, supra.

No member of the five judge minority voting to grant Petitioner's Rehearing in Banc offered a dissent to the Order Denying the Rehearing in Banc. Apparently, the members of the Sixth Circuit Court of Appeals agree that a disqualified judge should be included in the number of judges in "regular active service" for computation of a majority vote.

In any event, the issue is not properly presented to this Court. Petitioner failed to assert its challenge to the Sixth Circuit's in banc procedure to the Sixth Circuit Court of Appeals. This court, therefore, does not have the benefit of the Sixth Circuit's comment and analysis of its internal procedures.

II. THIS COURT NEED NOT INVOLVE ITSELF IN INTERPRETING MICHIGAN'S UNIQUE "PUBLIC INTEREST" PRIVILEGE, WHEN THAT PRIVILEGE DOES NOT IMPACT ON THE FEDERAL CONSTITUTION, AND WHEN THE INTERPRETATION BY THE MAJORITY OF THE COURT OF APPEALS WAS CORRECT UNDER THE FACTS OF THIS CASE.

There is no conflict between the opinion of the Sixth Circuit Court of Appeals in this case and in *Schultz* v. *Newsweek*, 668 F2d 911 (6th Cir, 1982). Both this case and *Schultz* considered the application of Michigan's unique "qualified privilege". That privilege protects the broadcasting of defamatory matter if the broadcast was in the "public interest". However, applying the facts of each case, the *Schultz* panel concluded that Michigan's qualified privilege protected the defamation; the panel in the instant case concluded that Michigan's qualified privilege did not protect the defamation. The conflict perceived by Petitioner is merely differing results arising out of an application of the law to the differing facts of each case. In the instant case, the court found this plaintiff was not the focus of the alleged public interest publication and, therefore, the public interest qualified privilege did not attach. *See*, Opinion of the Court, Petitioner's Appendix A, p. 13a. The majority in the instant case did not "revise or tinker" with Michigan qualified privilege, as alleged by Petitioner. Rather the majority applied existing Michigan law to a set of facts which had not yet been passed upon by a Michigan state court.

The First Amendment is not at issue in this case. The definition and scope of Michigan's qualified privilege is a matter of state law. Michigan law gives protections to news reporters in addition to those of the First Amendment.

If this case and *Schultz* v. *Newsweek*, supra, in fact conflict on the interpretation of Michigan's qualified

privilege, then the proper court for resolution of any such conflict is the Michigan Supreme Court by way of certified question. The Michigan Supreme Court is receptive to resolving certified questions from The United States District Courts and the Sixth Circuit Court of Appeals. *See eg., Ford Motor Co.* v. *Lumberman's Mutual Casualty Co,* 413 Mich 22, 319 NW2d 320 (1982).

Even if the alleged disputed issues are not resolved by the Michigan Supreme Court by way of certified question in this case, they can be resolved in the future through the certified question procedure from other Michigan Federal Courts, or through the Michigan court system itself.

CONCLUSION

Petitioner presents no issue novel or important to federal jurisdiction or federal procedural issues. Petitioner presents only an issue of internal Court administration.

Nor does Petitioner present issues arising out of a conflict among the circuits. Petitioner alleges only a conflict within the Sixth Circuit on an interpretation of Michigan law. In fact, there was no conflict as the cases differed in result due to analysis of the differing facts in the respective cases.

The judgment of the Sixth Circuit is not a final judgment. The order of the Circuit Court sends the case for trial to the U.S. District Court for the Eastern District of Michigan.

Respondent therefore respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,
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